84-943

No.

DEC 10 1984

ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

October Term, 1984

ESTER ELVRUM, et al.,

Petitioners,

v.

LEO WILLIAMS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the Secretary of the Interior's decision to recognize a tribal government as the political entity exercising jurisdiction over an Indian reservation subject to de novo review by a federal court?

2. Is the Quinault Indian Nation the political entity exercising jurisdiction over the Quinault Indian Reservation, as formally recognized by the Secretary of the Interior, acknowledged by Congress, and confirmed by the Interior Board of Indian Appeals, or do the Quinault Indian Nation and the Quileute Indian Tribe and perhaps other tribes exercise an undefined joint jurisdiction over the Quinault Reservation, as held by the Court of Appeals for the Ninth Circuit?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The only appellant in the court below was the respondent named in the caption, Leo Williams. The appellees in the court below were William P. Clark, Secretary of the Interior, United States of America, and the 30 individuals who are the heirs at law of Joseph Wilessi, joined as petitioners in this petition: Ester Elvrum, Irene Soeneke, Phillip C. Hanson, Philip S. Talbot, Alice Manes, Pearl Cousens, Dorothy Murray, Ira Talbot, Jacqueline Jauhola, Dorothy Nelson, Edward Verney, Patrick Verney, Bertha Bousley, Audrey Beaston, Delma Gagnon, Ruby McCovey, Gwendolyn Sanchez, Donna Grosz, Marlene Thweatt, Clarence Colby, Robin Halstead, Charles Talbot, Charles Williams, Estate of Patrick Wilkie, Jr., Estate of Edward

(Edison) Talbot, Estate of Bruce Wilkie, Lucille Mason, Alfred Williams, and Leta Shale.

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OPINIONS BELOW

Review is hereby sought of a decision of the United States Court of Appeals for the Ninth Circuit dated September 11, 1984, reported at 742 F.2d 549 (1984), reversing a district court decision that

affirmed a decision by the Interior Board of Indian Appeals that reversed a decision by an administrative law judge. The unreported opinion of the District Court for the Western District of Washington is contained in its findings of fact and conclusions of law dated October 14, 1983. The opinion of the Interior Board of Indian Appeals dated May 28, 1981 is reported at 8 IBIA 295 (1981). The unreported opinion of the administrative law judge is contained in his modification order dated November 16, 1979.

All of the opinions are set out in the Appendix at the pages indicated in the Table of Contents.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit is dated September

11, 1984 and was entered on the same date. See Appendix at A-1. This Court's jurisdiction is invoked through 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, TREATY, EXECUTIVE ORDERS AND STATUTES INVOLVED

This case involves Article I, Section 8 of the Constitution of the United States, which provides in pertinent part:

> The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

The case also involves The Treaty Between The United States And The Quinault And Quileute Indians (Treaty of Olympia) Articles 1, 2, and 6, 12 Stat. 971 (1855 and 1856), reprinted in 2 Kappler, Indian Law and Treaties, 719 (1904), and the Executive Orders of November 4, 1873 and

February 19, 1889, reprinted in 1 Kappler, Indian Law and Treaties, 923 (1904). The relevant provisions of the treaty and executive orders are reproduced in Appendix F.

The case also involves 25 U.S.C. § 2, which provides:

> The Commisioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

The case also involves the following statutes which are reproduced in Appendix F: 5 U.S.C. § 702, 5 U.S.C. § 706, 25 U.S.C. § 464 (1970), 25 U.S.C. § 464 (as amended in 1980), 25 U.S.C. § 476, 25 U.S.C. § 478, 25 U.S.C. § 479, and 25 U.S.C. § 2206.

STATEMENT OF THE CASE

In 1855 the United States agreed in a treaty with the Quinault and Quileute Indian tribes to set aside "a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President." The treaty permitted the President to consolidate the Quinaults and Quileutes with other friendly tribes or bands as well as to remove and relocate them "to such other suitable place or places . . . as he may deem fit." Both tribes agreed to "remove to and settle upon" the tract or tracts to be set aside for them.[1]

In 1873, by executive order, President Grant set aside a tract for the use of the

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[1] Articles 1, 2, and 6 of the Treaty of Olympia, Appendix F 1-3.

Quinault, Quileute, Hoh, Quit, and "other tribes of fish-eating Indians on the Pacific coast." The Quinault Tribe and Indians from other tribes and bands in the area settled on that reservation, known as the Quinault Reservation.

The Quileute Tribe rejected the newly-created reservation, refused to leave its ancestral home at LaPush to settle there, and insisted that the treaty entitled it to a separate reservation near its traditional fishing grounds. In 1889, the United States acceded and set aside a separate tract some distance away "for the permanent use and occupation of the Quileute Indians."[2] The Quileute Tribe

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[2]The executive orders are found at Appendix F 3-5. The history of the establishment of the separate reservations was not disputed and is summarized in the IBIA decision, Appendix C 18-24.

accepted this reservation and has carried on a government there to the present day.

In 1934 Congress passed the Indian Reorganization Act, 25 U.S.C. §§ 461-79 (1982) [hereinafter cited as IRA]. The IRA required the Secretary of the Interior to conduct elections on all Indian reservations to determine whether or not the residents of the reservations wished to accept the benefits and burdens of the act. In 1935 elections on both the Quinault Reservation and the Quileute Reservation, the residents of each reservation voted in favor of the IRA.

Since the 1935 election on the Quinault Reservation, the Quinault Indian Nation, which is an amalgamated tribe comprised of individuals tracing their ancestry to a number of different

tribes, has been recognized by the United States as the political entity exercising jurisdiction over the Quinault Reservation.[3] Since the 1935 election on the Quileute Reservation, the United States has also recognized the Quileute Indian Tribe as the political entity exercising jurisdiction over that reservation. The Quileute Tribe's constitution explicitly limits the tribe's jurisdiction to the borders of its 1889 Executive Order reservation and any lands later added to it.[4]

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[3]The long-standing, consistent federal recognition of the Quinault Indian Nation as the tribe exercising exclusive jurisdiction over the Quinault Reservation is discussed at pages 21-24, infra.

[4]Quileute Constitution, Article 1, Appendix G 1-2.

In the 95 years since the Quileute Tribe was granted and accepted its own separate reservation it never claimed that it is entitled to exercise any kind of jurisdiction on the Quinault Reservation. That claim was advanced for the first time by respondent Leo Williams, a member of the Quileute Tribe. Mr. Williams had been named in a decedent's will as the devisee of trust land on the Quinault Reservation. At the time of the decedent's death in 1970, Section 4 of the IRA prohibited the Secretary from approving any devise of trust land unless the devisee was an heir of the decedent, a member of "the tribe in which the lands or shares are located," or the tribe itself.[5] Mr. Williams, who is

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[5]Section 4 is codified as 25 U.S.C. § 464, and is reproduced as it existed at the time of the decedent's death in 1970 at Appendix F 8-9.

neither an heir of the decedent nor a member of the Quinault Tribe, advanced the argument that the Quileute Tribe is "the tribe in which the lands or shares [on the Quinault Reservation] are located."

The case began with a ruling by an administrative law judge permitting Mr. Williams to take the trust lands, on the theory that membership in the Quinault Tribe is not required under Section 4 because all fish-eating Indians of the Northwest have "joint jurisdiction" over the Quinault Reservation. The heirs at law of the testator appealed that ruling to the Interior Board of Indian Appeals [hereinafter cited as IBIA].

The IBIA, after asking for and receiving the views of the Solicitor of the Department of the Interior on the

political status of the Quileute and Quinault tribes, reversed. The IBIA held that the Quileute tribe does not exercise jurisdiction over the Quinault Reservation, and that members of the Quileute tribe are impermissible devisees of trust land on the Quinault Reservation.

Mr. Williams petitioned the district court for a review of the "agency action"[6] pursuant to 5 U.S.C. § 702, naming the Secretary and the United States as respondents. The district court affirmed the Secretary's decision and Mr. Williams appealed to the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1331.

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[6]The IBIA decision constituted the final decision of the Secretary of the Interior pursuant to 43 C.F.R. 4.312.

Both the Quinault and the Quileute Tribes presented amicus curiae briefs to the court of appeals. The Quinault brief urged affirmance of the IBIA and district court decisions confirming Quinault jurisdiction over the Quinault Reservation. The Quileute brief urged the court to avoid determination of jurisdiction and other sovereignty issues, maintaining that the Quinault, Quileute and Hoh Tribes were indispensible parties and that no record was established to allow a determination of such complex legal and political issues. The United States also urged the court of appeals to accept the Secretary's determination of the Quinault Indian Nation's exclusive jurisdiction over the Quinault Reservation. Despite the positions of the United States and the

two tribes, the court of appeals reversed, holding that both the Quileute Tribe and the Quinault Tribe, and possibly other tribes,[7] exercise jurisdiction over the Quinault Reservation.

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[7]After holding that both the Quileute and Quinault Tribes exercise jurisdiction over the Quinault Reservation, the court of appeals stated: "We do not consider here whether tribes other than the Quinault and Quileute also have jurisdiction over the Quinault Reservation for IRA § 4 purposes under the Executive Order of November 4, 1873." Appendix A 28. Since the Executive Order referred to the Quileute, Quit, Hoh, and "other fish-eating Indians of the Pacific coast," by the same reasoning utilized by the court of appeals joint jurisdiction over the Quinault Reservation would have to include such tribes. As discussed at pages 37, infra, among those who will be claiming entitlement to "joint jurisdiction" are descendents of "fish-eating Indians of the Pacific coast" who have not even been recognized as a tribe by the United States.

The court of appeals reasoned that on reservations where multiple tribes having property rights "have not formed a community," all of the tribes are to be considered "the tribe in which the lands or shares are located" under Section 4. In applying this reasoning the court assumed: (1) that the Quileute Tribe had a property right in the Quinault Reservation based upon the treaty, even though the place, size, and number of the reservation(s) to be established was in the President's discretion and the Tribe had rejected the Quinault Reservation and demanded and ultimately accepted a separate reservation, and (2) that the Indians of the Quinault Reservation "have not formed a community", even though they voted to have an IRA reservation and have

carried on with a federally recognized government for 50 years.

REASONS THIS WRIT SHOULD BE ALLOWED

A writ of certiorari should be granted in this case because (1) the decision below conflicts with this Court's decisions on the deference due a coordinate branch of government in determining the political status of Indian tribes, (2) it misinterprets the plain language and subverts the purpose of the IRA, in conflict with a decision of another federal court of appeals; and (3) it involves an important question of federal law affecting the basis and viability of governments of a number of Indian reservations.

I. The Lower Court Decision Conflicts with this Court's Decisions on the Deference Due the Executive Branch in Determinations of the Political Status of Indian Tribes.

Article I, Section 8 of the United States Constitution provides that Congress shall have the power "to regulate commerce . . . among the several states and with the Indian Tribes." Section 2 of Title 25, U.S.C., gives the Secretary of the Interior "the management of all Indian affairs and of all matters arising out of Indian relations."[8]

The political question of recognizing a particular tribal government as the legitimate government of an Indian reservation is clearly a part of managing "all

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[8] Act of July 27, 1868, c. 259, § 1, 15 Stat. 228, based on Act of July 9, 1832, c. 174, § 1, 4 Stat. 564, set out previously in full on page 4.

matters arising out of Indian relations."

This Court's decisions teach that such determinations are to be accorded particular deference by the courts. As Mr. Justice Brennan, in Baker v. Carr, 369 U.S. 186 (1962), noted:

> The status of Indian tribes: This Court's deference to the political departments in determining whether Indians are recognized as a tribe, while it reflects familiar attributes of political questions, United States v. Holliday, (US) 3 Wall 407, 419, also has a unique element in that the "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." [citing Cherokee Nation v. Georgia (US) 5 Pet 1, 16].

369 U.S. 215.

In United States v. Holliday, supra, this Court had stated:

> The facts in the case certified up with the division of opinion,

> show distinctly "that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in order to carry into effect the provisions of said treaty, that the tribal organization should be preserved." In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress. . . . This power residing in Congress, that body is necessarily supreme in its exercise. This has been too often decided by this court to require argument, or even reference to authority.

3 Wall at 419.

The decision of the court of appeals declaring that the Quileute Tribe, and

perhaps other tribes, have joint jurisdiction with the Quinault Tribe over the Quileute Reservation also conflicts with the principle that the courts should give great weight to a construction of a statute consistently given by an executive department charged with its administration. United States v. Jackson, 280 U.S. 183, 193 (1930); CBS, Inc. v. Federal Communications Com., 453 U.S. 367, 382 (1981). Departmental sponsorship of the IRA should also be considered in deferring to the interpretation of the statute by the agency charged with its implementation. Blanset v. Cardin, 256 U.S. 319, 326 (1921).

Rather than giving great deference to the decision of the Secretary, the court of appeals stated: "This appeal requires

us to interpret statutory and treaty language. It is thus subject to de novo review." (Appendix A-2). The court then proceeded with an analysis that does not even mention, much less respond to the facts and reasoning of the carefully written IBIA decision.

If the court of appeals had recognized its obligation to consider and give deference to the views of the United States, it would have seen that Congress, the courts, and the Department of Interior have consistently recognized the Quinault Indian Nation as the governing body of the Quinault Reservation. In 1947 Congress declared the Quinault Nation to be the proper party plaintiff to litigate crucial border disputes on the Reservation, 61 Stat. 416. In support of this legisla-

tion, the Secretary of the Interior had written to Congress that, "[c]ollectively the Indians having an interest in that Reservation, including those of the blood of other tribes consolidated with the Quinaults pursuant to the Treaty, Executive Order, and a act of Congress, may be regarded as one tribe." H. Rep. No. 671, 80th Cong., 1st Sess. (1947) (emphasis added). Since 1947, Congress has twice returned land specifically to "the Quinault Tribe of Indians."[9]

The courts have also recognized the Quinault Tribe as the tribal governing body of the Quinault Reservation. Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967 (1982);

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[9]Act of October 15, 1962, 76 Stat. 913; Act of August 26, 1959, 73 Stat. 427.

Quinault Tribe of Indians v. Gallagher, 368 F.2d 648, 656 (9th Cir. 1966), cert. denied, 387 U.S. 907 (1967). In United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), the Quileute Tribe, a party did not appeal the District Court's determination that the Quinault Tribe is the federally recognized tribal government on the Quinault Reservation, and that the Quileute Tribe maintains a tribal government on the Quileute Reservation. United States v. Washington, supra, at 372, 374.

The Department of Interior has consistently recognized that the Quinault Tribe governs the Quinault Reservation and stated that fact clearly to the court of appeals

in the brief of the United States.[10] Based on this recognition the Department enters numerous contracts exclusively with the Quinault Nation for the provision of government services on the Quinault Reservation under the Indian Self-Determination Act, 25 U.S.C. § 450a.

The decision of the court of appeals in this case is extreme and without precedent. Petitioners have not been able to find a single case where a federal court has disregarded the long-standing determination and recognition by the Secretary of the Interior of the legitimate government of an Indian reservation.

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[10] Court of appeals brief for the federal appellees at 20-26. See also the Department of the Interior's published list of federally recognized tribes, showing the Quinault Tribe as the recognized tribe on the Qunault Reservation, and the Quileute Tribe as the recognized tribe on the Quileute Reservation. 47 Fed. Reg. 53,130 (1982).

II. The Court of Appeals' Holding That the Quinault Indian Nation Does Not Exercise Exclusive Jurisdiction Over Its Own Reservation Is Based on an Erroneous Interpretation of the IRA and Conflicts With the Plain Language of the Statute and a Decision of the Tenth Circuit Court of Appeals.

As this Court has noted, the IRA was ". . . a statute specifically intended to encourage Indian tribes to revitalize their self-government." Fisher v. District Court, 424 U.S. 382, 387 (1976). The IRA specifically contemplated situations such as that existing on the Quinault Reservation where there were a number of tribes "residing on the same reservation." Section 16 provided that "[a]ny Indian tribe, or tribes, residing on the same reservation shall have the right to organize for its common welfare

. . . ." Appendix F 10. Section 18, the provision determining whether or not the IRA would apply to any reservation, provided that the question would be decided not by the tribes on a reservation, but by secret ballot by "a majority of the adult Indians, voting at a special election . . ." called by the Secretary. Appendix F 11.

Section 19 specifically defined "tribe" to include "the Indians residing on one reservation." If the residents decided that they wanted to have an IRA reservation, the "Indians of the reservation" became the tribe contemplated by the IRA.

The heart of the court of appeals' analysis and the source of its error is found in the following language from the

section of the decision captioned "The Tribe Contemplated By Section 4":

> If Congress had intended that in areas in which multiple tribes having property rights have not formed a community, only one tribe would manage the property and thus be the tribe in which the lands are located under section 4, it must have intended to divest the other tribes and designate that one tribe. Congress did not do so, or refer to tribes as being any other than those having property rights in an area. We therefore conclude that section 4 comprehends all tribes having property rights in an area. To hold otherwise would require courts to determine which tribes could manage land and which would be divested of their property rights in each reservation or area in which multiple tribes having property rights have not formed a community. We decline to do this. Although courts routinely determine property rights, Indian property rights are unique in that they are directly conferred and subject to comprehensive statutory and administrative regulation. Thus, we decline to hold

> that IRA divests Indian tribes of existing property rights absent some indication that Congress so intended.

Appendix A 13-14.

The lower court's analysis contains a number of unstated premises, all of which are erroneous. The first unstated erroneous premise is that the IRA contemplates that it is the tribes on multiple-tribe IRA reservations that are to choose whether or not to "form a community." If the tribes chose not to "form a community," by the court of appeals' reasoning those tribes continue to have property rights and to exercise jurisdiction on a reservation.

The notion that the tribes themselves were to participate and control the decision on reorganization is fundamentally at odds with the scheme and purpose of the

IRA. Upon enactment of the IRA, individual Indians of all reservations, regardless of tribal affiliation, became entitled to vote on whether or not they wished to have an IRA reservation. If they voted for the IRA, the "Indians of the reservation" became the consolidated tribe contemplated in Section 19's definitions of "tribe". Through this process it was thus possible to strengthen Indian self-government by creating a single, unified government on reservations having multiple tribes with unclear and potentially conflicting jurisdictional claims. Under the court of appeals' rationale, the only way a multiple-tribe reservation could establish a unified government would be for all of the tribes themselves to consent to the formation of a community.

That was precisely the pre-IRA dilemma that the IRA was designed to change.

When a majority of the adult Indians residing on the Quinault Reservation voted to have the IRA applied to the reservation, they formed precisely the community envisioned by the IRA.

The court of appeals made a second conceptual error about the basic plan of the IRA that led the court inevitably to its erroneous conclusion about the status and legitimacy of the existing Quinault tribal government. That error is found in footnote 5 (Appendix A 22-23), where the court noted that "the Quinault Indian Nation By-Laws have not been approved by the Secretary of the Interior, <u>although the IRA provision which permits tribes to adopt constitutions so requires</u>. IRA

§ 16, 25 U.S.C. § 476 (1982)." [Emphasis added]

It is true that after voting to become an IRA reservation the Indians of the Quinault Reservation never submitted their constitution or by-laws to the Secretary for approval. However, the court of appeals' conclusion that Section 16 of the IRA requires Secretarial approval of tribal constitutions or by-laws is simply wrong.

Section 16 provides in plain language that "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws . . . ." [emphasis added]. (Appendix F 10) The legislative history of Section 16 confirms that

although the right to organize was absolute, organization through adoption of an IRA constitution or otherwise was left to the Indians themselves. Prior to the enactment of the IRA, its chief architect, Commissioner Collier, assured concerned tribes that the Act would allow them "free choice to retain present [pre-IRA government]." Sen. Hearing on S.2755, 73rd Cong., 2nd Sess., at 81 (1934).

The Ninth Circuit Court of Appeals' belief that Secretarial approval of the Quinault organic documents are required by the IRA is in direct conflict with the decision of the Tenth Circuit Court of Appeals in Southland Royalty Company v. Navajo Tribe of Indians, 715 F.2d 486 (10th Cir. 1983):

> "The purpose of the IRA was to enable and encourage Indian

> self-government. Organization under the IRA was not the only form of self-government acceptable to Congress. One of the ways in which the IRA reflects a respect for self-government was in the provision that makes adoption of a constitution optional. 25 U.S.C. § 476. The choice of government is in itself an act of self-government and consonant with congressional policies."

715 F.2d at 489.

In the fifty years since the passage of the IRA, the Secretary of Interior has consistently held that IRA tribes are not required to obtain Secretarial approval of their basic governing documents.[11] If the court of appeals' interpretation of Section 16 were correct, the constitutions of all of the Indian tribes that operate

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[11] See, e.g, II Opinions of the Solicitor 1988, 1992 (Feb. 18, 1969).

on the basis of non-approved constitutions and by-laws would be invalid.[12]

The court of appeals' analysis quoted at pages 26-27, infra has yet another erroneous assumed premise. The court assumed without discussion that the Quileute Tribe has a treaty-based property right in the Quinault Reservation. This erroneous assumption is carried over into the court's extensive analysis of whether this assumed "treaty right" would be "abrogated" by a holding that the Quinault Tribe has exclusive jurisdiction over the Quinault Reservation. On this point, the court of appeals simply disregarded the historical facts and the administrative

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[12] See, e.g., Haas, Ten Years of Tribal Government Under I.R.A., United States Indian Service (1947), listing tribes that do not have approved constitutions.

and judicial analysis of that history, including the IBIA's careful decision in this case and the earlier Ninth Circuit decision in U.S. v. Moore, 62 F. Supp. 660 (W.D. Wash. 1945), aff'd, 157 F.2d 760 (9th Cir. 1946).

The treaty obligation of the United States was fulfilled by the creation of a separate reservation for the Quileute Tribe after that tribe refused to accept and move onto the Quinault Reservation. The treaty specifically provided that the United States would set aside a tract or tracts and further entitled the United States to remove any of the tribes from any such reservation or reservations to "such other place or places he [president] may deem fit." The court of appeals' brief recitation of the historical back-

ground describes the treaty as though it contemplated that the United States was obligated to provide a single reservation for both tribes, apparently overlooking the United States' options of establishing multiple reservations or of later removal and relocation. Appendix A 16-17.

In summary, the court of appeals proceeded on fundamentally incorrect assumptions about the philosophy and mechanics of the IRA, and compounded its error by a superficial and mistaken reveiw of the actual history of the relationship between the United States and these treaty tribes. The result is described in the next and final section of this petition.

III. The Decision Below Creates a "Jurisdictional Nightmare" That Strikes at the Heart of Effective Self-Government.

In its brief to the court of appeals, the United States stated that a theory that would give political jurisdiction to the distant tribes of individual Indians having property rights arising out of the allotment era[13] would "create a jurisdictional nightmare on the Quinault Reservation."[14]

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[13] See General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by the Act of June 25, 1910, 36 Stat. 855; Act of March 4, 1911, 36 Stat. 1345; Halbert v. United States, 283 U.S. 753 (1931). This court in Halbert declared the rights of individual Quileute Indians to share in allotments on the Quinault Reservation, a right arising not out of the treaty, but out of a 1911 Act of Congress, and did not extend jurisdiction over the allotment, or the reservation to the tribe of which the allottee might be a member.

[14] Brief of Federal Appellees in Court of Appeals, at 24.

Similarly, the amicus brief of the Quinault Tribe informed the lower court:

> The result that appellant and amicus [Chinook Tribe] seek would lead to chaos in the administration of the Reservation. Aside from the prospect of 8 tribes exercising independent and potentially conflicting jurisdiction, one would be faced with the question of which of the at least 3 unrecognized Chinook groups (amicus Chinook Tribe, Tchinouk Tribe, or Wahkiakum Band of Chinooks) and at least 4 unrecognized Cowlitz Tribes holds the jurisdictional interest it is asserted the Chinook and Cowlitz possess. See Hearings before Senate Select Committee on Indian Affairs on S. 2931, 97th Cong., 2d Sess., (December 7, 1982).[15]

While holding that the Quinault and Quileute Tribes have joint jurisdiction over the Quinault Reservation, (and suggesting that "other fish-eating tribes

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[15]Court of Appeals brief of amicus curiae Quinault Indian Nation at 4.

of the Pacific Coast" may also share that jurisdiction) the court of appeals has closed its eyes to reality. Tribal governments of an undefined number of tribes, located far from the reservation, with no guidance as to the nature and extent of their newly-declared "joint jurisdiction" cannot possibly provide effective self-government for the Quinault Reservation.

Is the responsibility for providing basic government services such as utilities, schools, and fire and police protection to be shared jointly? Are all existing laws applying to the reservation invalid under the court of appeals' holding, since they were enacted by an entity that did not have complete jurisdiction and proceeded under an invalid

constitution? Does the court of appeals holding only affect property interests? Do all such tribes have a right to some portion of the revenue produced by land owned by the Quinault Tribe? To escheated property?[16] Do they all have an interest in zoning laws and land-use policies? Is the pariticipation of such tribes in

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[16] A simple but practical example of the mischief of the court of appeals' holding is seen by considering its impact on the Indian Land Consolidation Act, 25 U.S.C. § 2206 (Appendix F 12), authorizing any tribe, through its governing body, to adopt a plan to eliminate fractional interests in trust land and consolidate tribal land ownings. The act further requires that fractional interests in trust property representing two percentum or less of any tract of trust land "shall escheat to that tribe." Rather than consolidating such fractional interests on the Quinault Reservation, under the decision of the court of appeals the Secretary of the Interior can not even know to which tribe(s) and in what way the interest must be conveyed.

enacting laws to be determined on a one-tribe one-vote basis? If it is to be weighted, is it to be based on the total membership of each tribe, the number of members of each tribe with an interest in an allotment on the Quinault Reservation, the number of members of each tribe who reside on the reservation, or some other basis? From these unanswered questions, and infinite others that can easily be anticipated, it is apparent that the court of appeals' interpretation of Section 4 gravely threatens the prospects for effective exercise of self-government on the Quinault Reservation. Since Section 4 permits a testator to devise trust lands to the tribe in which the lands or shares are located, under the court of appeals' holding all of the

"joint jurisdiction" tribes are eligible devisees of restricted land on the Quinault Indian Reservation. Clearly, in attempting to promote the reacquisition of reservation land by Indian tribes, Congress did not intend that reservations would be owned in some random, checkerboard fashion by a number of other Indian tribes, some of which are located on distant reservations of their own.

The governance of the Quinault Indian Reservation is a serious responsibility, involving the lives and liberties of large numbers of persons, residents and non-residents of the reservation, and members and non-members of the Quinault Indian Tribe. The Quinault Indian Nation (both before and after the enactment of the IRA, and the acceptance of the

IRA by the Indians of the Quinault Reservation) has responsibly exercised criminal and civil jurisdiction over the entire reservation. The court of appeals holding strikes at the heart of effective self-government. Unless reversed, the decision below will spawn endless litigation and bring chaos to the Quinault Reservation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted this 10th day of December, 1984.

MacDONALD, HOAGUE & BAYLESS

By_____
Frederick L. Noland
of Attorneys for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEO WILLIAMS,	)	NO. 83-4229
	)	
Petitioner-Appellant,	)	USDC NO. CV 81-700C
	)	
vs.	)	
	)	
WILLIAM P. CLARK, Secretary of the Interior, United States of America, et al.,	)	O P I N I O N
	)	
Respondents-Appellees.	)	

Argued and Submitted June 8, 1984.

Decided Sept. 11, 1984

Appeal from the United States District Court for the Western District of Washington.

Before KILKENNY, NELSON, Circuit Judges, and EAST*, District Judge.

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* Hon. William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

NELSON, Circuit Judge:

Leo Williams, a member of the Quileute Tribe of indians, appeals the district court's affirmance of a decision by the Interior Board of Indian Appeals (IBIA). The IBIA decision reversed the Administrative Law Judge's (ALJ) ruling that Williams is an eligible devisee of land on the Quinault Indian Reservation. We reverse the district court's decision and reinstate the ALJ's decision ordering distribution of the Quinault Reservation land under the will of William's deceased cousin, Joseph Willessi.

FACTUAL AND PROCEDURAL BACKGROUND

Joseph Willessi, a member of the Quileute Tribe, executed a will in which he devised land on the Quinault Reservation

to Williams. 1/ The property is part of the Indian lands held in trust by the United States. After Willessi died, his heirs contested the will. On February 10, 1972, the ALJ approved it and ordered distribution. The IBIA ordered a rehearing. On January 6, 1977, the ALJ again approved the will and ordered distribution.

On April 5, 1978, the Bureau of Indian Affairs petitioned the ALJ to reopen the estate proceedings. The BIA alleged for the first time that section 4 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (1982) ("IRA"), bars Williams from receiving an interest in trust land on the Quinault Reservation

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1/ Willessi also devised land on the Makah Reservation to Williams. Williams does not dispute the decisions below holding that he is not a permissible devisee of this land. We therefore express no opinion on this issue.

because Williams is neither an heir nor a member of the Quinault Tribe of indians. Three months later, the heirs also petitioned to reopen.

After initially holding Williams ineligible, the ALJ ruled that Williams is an eligible devisee. The ALJ determined that the Quinault Tribe's jurisdiction over the Quinault Reservation is not exclusive. Thus, he determined that the Quileute Tribe also had jurisdiction over the Quinault Reservation such that Williams was an eligible devisee. The IBIA reversed, holding that section four of the IRA bars Williams from inheriting the trust lands because the only permissible devisees were members of the Quinault Tribe and Willessi's heirs. Because Williams fell into neither of these

classifications, he was not a permissible devisee. The district court affirmed the IBIA's decision and Williams timely appeals.

DISCUSSION

I

Standard of Review

This appeal requires us to interpret statutory and treaty language. It is thus subject to de novo review. See 5 U.S.C. § 706 (1983) Cultee v. United States, 713 F.2d 1455, 1457 (9th Cir. 1983) cert. denied, - U.S. - , 104 S.Ct. 2150, 80 L.Ed. 2d 537 (1984). 2/

2/ Before analyzing the effect of the IRA on Williams' status as a devisee of Quinault Reservation land, we must determine whether the IRA applies to the Quinault Reservation. This threshold inquiry is easily resolved because we have previously applied the IRA to this reservation. See Cultee v. United States, 713

[Footnote continued]

II

IRA Restrictions on Land Transfer

The IRA restricts transfers of trust lands on the Quinault Reservation. IRA § 4 (codified as amended at 25 U.S.C. § 464 (1983). 3/

[Footnote continued from previous page]

F.2d 1455 (9th Cir. 1983), cert. denied, - U.S. - , 104 S.Ct. 2150, 80 L.Ed.2d 537 (1984) (applying the IRA to the Quinault Reservation). We reaffirm that holding here.

3/ The test of Section 4 reads, in relevant part, as follows:

> [N]o sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located...and in all instances such lands or interests shall descend or be

[Footnote continued]

IRA section 4 generally prohibits transfers of trust lands, but provides that the Secretary of the Interior may approve certain transfers. Id. "Among the transfers that the Secretary may approve are devises to the members of the Indian tribe in which the lands...are located." Id.

Appellants contend that the Quinault Tribe is the only tribe in which the property at issue is located. Williams,

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[Footnote continued from previous page]

> devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located...to any member of such tribe or of such corporation or any heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust.

25 U.S.C. § 464 (1983).

in contrast, insists that the Quileute Tribe should also qualify as a tribe in which the land is located. This distinction is the crux of this appeal.

III

Williams is a Permissible Devisee

A. The Tribe Contemplated By Section 4

The language of section 4 gives little guidance concerning the meaning of the phrase "the Indian Tribe in which the lands...are located." An Indian tribe is usually considered to be a political entity, not a geographical area. What Congress intended by referring to the tribe in which the lands are located is therefore not immediately apparent. We may derive guidance in the interpretation of section 4, however, from the General Allotment Act of 1887 ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§

331 et seq. (1983) ("GAA"), the system governing Indian landholding until Congress enacted the IRA; the IRA was enacted specifically to remedy problems that had been created primarily by the GAA. See Readjustment of Indian Affairs: hearings on HR 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) 15-17, 25-27 ("Readjustment Hearings"); To Grant To Indians Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645: Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) 15-16, ("Hearings on S. 2755 and S. 3645").

Under the GAA, the Government parcelled out a set number of acres of reservation property to each individual

Indian, a larger set acreage for each family. Id. The government held some of the allotments in trust for allottees; other allottees received title to their property. See W. Canby, American Indian law, 20-21 (1981); F. Cohen, Handbook of Federal Indian Law, 136-138 (2d ed. 1982). The government purchased most of the reservation property remaining after eligible allottees had received their allottments and resold it to settlers. Canby, supra, at 20.

By the 1930's, Indian landholdings on reservations subject to the GAA had decreased by over 85%, and Indians were increasingly impoverished. See Readjustment Hearings, supra, at 15-17; Hearings on S. 2755 and S. 3645, supra, at 16-19. Many of the allotments to which Indians had held title had fallen into non-Indian

hands. Id.; Cohen, supra, at 138. This phenomenon, combined with the government's sales of surplus property to non-Indians, had caused reservations to become checkerboards of Indian-held and non-Indian-held land. Id. As a result, the remaining Indian parcels were too small to be useful for grazing, the sole possible use for most of the parcels. Id. Non-Indians leased most of the parcels, generally at unfairly low rents. Id.

In enacting the IRA, Congress first contemplated that all Indian property would be held and administered by a tribe or a community, which was apparently intended to be either an amalgamation of all tribes on a reservation or in an area or a small segment of such reservation or area. See, e.g., Readjustment hearings, supra, at 26-27, 160; Hearings on S. 2755

and S. 2645, supra, at 26-27. Individual Indians would receive shares in tribal or community assets in exchange for their parcels and would have a preferred right to use what had been their property. Id. Indians, however, opposed this communal ownership. See, e.g., Readjustment Hearings, supra, at 160, 235-37, 299 (Statements of Vern E. Thompson, representing the Quapaw Tribe, James Saluskin, representing the Yakima Tribe, and Ute Arapaho, representing the Cheyenne-Arapaho Tribe). Thus, Congress abandoned the tribal or community ownership concept. See, e.g., Hearings on S. 2755 and S. 3645, supra, at 231-237; 25 U.S.C. §§ 461 et seq. (1983). The version of the IRA that was finally enacted provided that tribes would own and manage lands that the government had sold under the GAA and was

directed to repurchase. See id. That version also, rather than providing for a transfer of individually held property to a tribe or community, extended trust periods and included section 4, which permits Indian landholders to transfer their lands only to other members of the tribe in which the lands are located. See id.

[1] If Congress had intended that in areas in which multiple tribes having property rights had not formed a community, only one tribe would manage the property and thus be the tribe in which the lands are located under section 4, it must also have intended to divest the other tribes and designate that one tribe. Congress did not do so, or refer to tribes as being any other than those having property rights in an area. We

therefore conclude that section 4 comprehends all tribes having property rights in an area. To hold otherwise would require courts to determine which tribes could manage land and which would be divested of their property rights in each reservation or area in which multiple tribes having property rights have not formed a community. We decline to do this. Although courts routinely determine property rights, Indian property rights are unique in that they are directly conferred and subject to comprehensive statutory and administrative regulation. Thus, we decline to hold that IRA divests Indian tribes of existing property rights absent some indication that Congress so intended.

The GAA gave individual Indians property rights in trust lands if their

tribes had rights in those lands. The Supreme Court has recognized that the Quileute Tribe had rights in the Quinault Reservation such that its members were entitled to allotments there. In United States v. Payne, 264 U.S. 446, 44 S.Ct. 352, 68 L.Ed. 782 (1924), the Court found that members of the Quileute Tribe were entitled to allotments of timber land, as well as agricultural land, on the Quinault Reservation. Payne, 264 U.S. at 448-49, 44 S.Ct. at 352-53. This holding, based on the Quileute Tribe's rights under the Treaty of Olympia, necessarily assumes that the Quileute Tribe has rights in the Quinault Reservation.

B. The Quileute Tribe has Treaty Rights in the Quinault Reservation

[2] We turn to an examination of the source of the Quileute Tribe's claimed

interest in the Quinault Reservation. Indian tribes may acquire property interests by treaty. See F. Cohen, Handbook of Federal Indian Law, 472 (2d ed. 1982). Under the Treaty of Olympia, the Quinault and Quileute Tribes ceded their lands to the United States. Treaty between the United States and the Quinault and Quileute Indians (Treaty of Olympia), Art. 1, 12 Stat. 971 (1855 and 1856) reprinted in II C. Kappler, Indian Law and Treaties 719 (1904). In return, the treaty provided that the President would select land in Washington "sufficient for their wants" for their use and occupancy. Id. at art. 2. The treaty further provided that the tribes agreed to move onto the reservation within one year of ratification of the treaty.

In 1873, pursuant to the Treaty of Olympia, President Grant issued an executive order setting aside 350 square miles of land for the use of the Quinaults, Quileutes, two other named tribes, and "other tribes of fish-eating Indians on the Pacific coast." Executive order of November 4, 1873, reprinted in I.C. Kappler, Indian Laws and Treaties 923 (1904). This reservation became known as the Quinault Reservation.

C. The Quileute Tribe's Treaty Rights Have Not Been Abrogated

1. Congress has not abrogated the Quileute Tribe's treaty rights.

[3] Congress may abrogate rights reserved to Indian tribes in treaties. To abrogate treaty rights, however, Congress must clearly and unequivocally express its intent to do so. State of Idaho v. Andrus, 720 F.2d 1461, 1464 (9th

Cir. 1983). We do not find that Congress expressed such intent.

[4] Appellants contend that Congress manifested its intent to abrogate by designating the Quinault Tribe as representative of all Indians on the Quinault Reservation. We disagree. In 1947 Congress designated the Quinault Tribe as the proper plaintiff to litigate a boundary dispute on behalf of all Indians with interests in the Quinault Reservation. Act of July 24, 1947, 61 Stat. 416 (1947). Rather than generally acknowledging that the Quinault Tribe was the sole tribe having jurisdiction over the Quinault Reservation, however, Congress permitted the Quinault Tribe to represent Indians with interests in the reservation only in a particular action, which was identified by number. See H. Rep. No. 671, 80th

Cong., 1st Sess. (1947). The Court of Claims had held that the Quinault Tribe could not recover for the value of land that the United States had appropriated because it determined that other tribes, including the Quileute Tribe, had interests in the land under the Treaty of Olympia and Executive Order of November 4, 1873. Quinaielt Tribe v. United States, 102 Ct.Cl. 822, 834-35 (1945).

2. The Quinault Tribe's unilateral action has not abrogated the Quileute Tribe's rights.

The IRA does not mandate that the tribe in which the lands are located be one tribe. See IRA § 19, 25 U.S.C. § 479 (1983) (defining "tribe" as including "the Indians residing on one reservation"). Nevertheless, appellees contend that only the Quinault Indian nation has exclusive rights in Quinault Reservation property

primarily because: (1) a separate reservation was set apart for the Quileutes sixteen years after the Quinault Reservation was set aside; and (2) its tribal council, according to its by-laws, has made and enforced various rules on the Quinault Reservation. 4/

4/ The Quinault Indian nation also contends that the Department of the Interior has recognized it as the sole tribe exercising jurisdiction over the Quinault Reservation. The authority the Quinault Tribe cites for this proposition is the Department's list of tribes it has determined are eligible to receive Bureau of indian Affairs services. 47 Fed.Reg. 53,130 (1982). There is no suggestion that the geographical or reservation designations, which are not listed for all of the tribes, were included for any purpose other than assisting in identifying the tribes. Accordingly, the reservation designations are entitled to little weight. Cf. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580-81 (1st Cir.), cert. denied, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979), (questioning the deference due Department's determination

[Footnote continued]

We find that none of these has divested the Quileute Tribe of its rights under the Treaty of Olympia.

[5] First, the creation of a separate reservation for the Quileute Tribe did not extinguish all Quileute treaty rights in the Quinault Reservation. In 1889 a

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[Footnote continued from previous page]

of tribal status, issue on which the Department has not historically spent much effort").

Appellees also contend that his court recognized in Quinault Tribe v. Gallagher, 368 F.2d 648, 655 (9th Cir. 1966) (on rehearing) that the Quinault Tribe exercises exclusive jurisdiction over the Quinault Reservation. Although we stated in Galagher that the Quinault Tribe had a governing body "duly recognized by the Secretary of the Interior," we did so only for the purpose of 28 U.S.C. § 1362 (1983), which permits tribes having such governing bodies to bring certain actions in district court. Gallagher, 368 F.2d at 655-56. We did not hold that the Quinault Tribe exercises or may exercise exclusive jurisdiction over the Quinault Reservation. See id.

reservation was set aside exclusively for the Quileute Tribe. Executive order of February 19, 1889, reprinted in I C. Kappler, Indian Laws and Treaties 923 (1904). Although the treaty specifically authorized the President to remove Indians from the Quinault Reservation, see Treaty of Olympia, art. 6, the Quileute Tribe was never so removed.

[6] Second, the Quinault Tribal Council's exercise of jurisdiction over the Quinault Reservation to make and enforce rules also does not foreclose the Quileute Tribe's property rights in the Quinault Reservation. 5/ The rules that

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5/ The Quinault Tribal Council's By-Laws do not specify the duties of the tribal council. See Quinault Tribal Council Bylaws (1972). We note also that the Quinault Indian Nation By-laws have not

[Footnote continued]

the tribal council has made and enforced have involved such areas as building, health, and safety, see Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982), and zoning, see Sechrist v. Quinault, 9 Indian L.Rep. 3064 (W.D. Wash. May 7, 1982). The mere fact that the Quinault Tribe has exercised power over the Quinault Reservation to make rules improving the overall quality of life for its inhabitants does not, however, lead inevitably to a conclusion that no other body has any rights in the reservation for any purpose. Even if the

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been approved by the Secretary of the Interior, although the IRA provision which permits tribes to adopt constitutions so requires. IRA § 16, 25 U.S.C. § 476 (1982).

Quinault Tribe's rulemaking power were exclusive, that should not prevent other tribes from having property rights in the Quinault Reservation.

3. The Quileute Tribe has not extinguished its rights in the Quinault Reservation.

[7,8] The Quileute Tribe's failure to state expressly in its constitution that the Quinault Reservation is part of its territory does not extinguish the tribe's property rights in the reservation. 6/ Treaty rights may be extinguished only

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6/ The Quileute Tribe Constitution and By-Laws states:

> Article I - Territory
>
> The jurisdiction of the Quileute Tribe shall include all the territory within the original confines of the Quileute Reservation as set forth by Executive order of February 19, 1889,

[Footnote continued]

in rare instances. Laches or estoppel may not defeat treaty rights. Swim v. Bergland, 696 F.2d 712, 718 (9th Cir. 1983). Additionally, the Supreme Court has implied that a tribe may not unilaterally relinquish jurisdiction absent explicit congressional authorization and strict compliance with statutory requirements. See Kennerly v. District Court, 400 U.S. 423, 426-29, 91 S.Ct. 480, 481-83, 27 L.Ed.2d 507 (1971). In Kennerly, Congress had specifically authorized tribes to grant concurrent civil jurisdiction to the state in which the tribe was located. Id. at 424-25, 91 S.Ct. at

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[Footnote continued]

and shall extend to such other lands as have been or may hereafter be added thereto under any law of the United States, except as otherwise provided by law.

481. The statute required, however, that for the grant to be effective, a majority of tribal members had to vote to permit the grant. Id. at 429, 91 S.Ct. at 483. Because only the tribal council, and not the tribal members, had voted to allow the grant, the Court held that the state had no civil jurisdiction. 7/ If the

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7/ Appellees contend that the Quileute Tribe could extinguish its rights by failing to expressly exercise them in its constitution, citing Quechan Tribe v. Rowe, 531 F.2d 408 (9th Cir. 1976). Quechan Tribe, however, is inapplicable here. In Quechan Tribe, we held that we did not need to consider whether the tribe had criminal jurisdiction over non-members because the tribal constitution limited the tribe's criminal jurisdiction to members. Quechan Tribe, 531 F.2d at 411. We also pointed out there that whether a tribe could exercise criminal jurisdiction over non-members under any circumstances was an open question. See id. at 411 n. 4. A tribe may, however, exercise civil jurisdiction over non-members. See Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), cert. denied, - U.S. - , 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984).

tribal council in Kennerly could not explicitly extinguish its rights pursuant to congressional authorization, the Quileute Tribe could not have implicitly extinguished its rights, absent congressional authorization, here.

[9] We therefore hold that both the Quileute Tribe and the Quinault Tribe exercise jurisdiction over the Quinault Reservation and either may be considered the tribe in which the lands are located for purposes of IRA § 4. 8/ A member of either tribe is therefore a permissible devisee of Quinault Reservation lands

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8/ We do not reach Williams's contentions that appellees are barred from attacking Willessi's will, IRA § 4 denies him equal protection, or collateral heirs as well as heirs are permissible devisees under IRA § 4.

[Footnote continued]

under IRA § 4. Accordingly, we reverse and order distribution of the Quinault Reservation land to Williams as provided by Willessi's will.

REVERSED

[Footnote continued from previous page]

We do not consider here whether tribes other than the Quinault and Quileute also have jurisdiction over the Quinault Reservation for IRA § 4 purposes under the Executive Order of November 4, 1873. Further, we do not consider the extent of the Quileute Tribe's jurisdiction over the Quinault Reservation. Cf. Healing v. Jones, 210 F.Supp. 125 (D. Ariz. 1962), aff'd, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963) (Hopi and Navajo Tribes held to have joint equal interest in parcel of reservation land).

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

LEO WILLIAMS, Petitioner/Appellant, vs. JAMES WATT, Secretary of the Interior, United States of America, et al., Respondents/Appellees.	NO. C81-700C FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came on for trial before this Court on August 16, 1983. Based on the administrative record and the pleadings in this case, and in consideration of the evidence at trial, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Decedent Joseph Willessi, a member of the Quileute Tribe, devised by will certain portions of his estate to Leo Williams, also a member of the Quileute Tribe, including trust property located within the boundaries of the Quinault Reservation.

2. In review of the Administrative Law Judge's probate determination in this case, the Interior Board of Indian Appeals concluded that the decedent's devise of property on the Quinault Reservation was subject to the terms of Section 4 of the IRA, 25 U.S.C. § 464; that the trust property located on the Quinault Reservation could not be devised to the petitioner as provided in the will; and awarded distribution of the property to the respondent heirs.

3. An election pursuant to the Indian Reorganization Act was held on the Quinault Indian Reservation on April 13, 1935. Voting in that election was limited to residents of the reservation, or otherwise qualified Indians who certified they regarded the reservation as their permanent home and residence.

CONCLUSIONS OF LAW

4. The election of April 13, 1935, complied in all respects with the requirements of the Indian Reorganization Act.

5. Pursuant to the election of April 13, 1935, the Quinault Reservation and the lands located therein are subject to the terms and restrictions of the IRA.

6. The Interior Board of Indian Appeals properly concluded that the Quinault Reservation is subject to the

terms of the Indian Reorganization Act and also properly concluded that the devise of property on the Quinault Reservation is subject to the terms of Section 4 of the IRA, 25 U.S.C. § 464. These conclusions were supported by substantial evidence.

7. The IBIA correctly applied Section 4 of the IRA to prohibit a devise of trust land on the Quinault Reservation to other than an heir of the testator, to the Tribe having jurisdictional authority over the Reservation, or to any member of the Quinault Tribe.

8. The IBIA decision was warranted by the facts and supported by substantial evidence and was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, and therefore is confirmed on the record.

The Clerk of this Court is directed to enter Judgment accordingly and to send uncertified copies of the Judgment and of these Findings and Conclusions to all counsel of record.

DATED this 14th day of October, 1983.

John C. Coughenour
United States District Judge

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of Hearings and Appeals

Interior Board of Indian Appeals

4015 Wilson Boulevard
Arlington, Virginia 22203

ESTATE OF JOSEPH WILLESSI

IBIA 80-20 Decided May 28, 1981

Appeal from order by Administrative Law Judge Robert C. Snashall approving will and ordering distribution.

Reversed.

1. Indian Probate: Indian Reorganization Act of June 18, 1934: Construction of Section 4 - Indian Probate: Wills: Construction of

Jurisdiction of indian tribe over Quinault Reservation where estate trust property was located being material to a decision concerning the eligibility of a devisee to take property under an Indian will, it was error to hold that the General Allotment Act conferred jurisdiction over the

reservation upon the tribes of persons allotted on the reservation without regard to the historical development of the reservation and the actual implementation of the treaty rights of the tribes concerned. The record demonstrates that since acceptance of the Indian Reorganization Act of 1934 (IRA) the Quinault Tribe exercised exclusive jurisdiction over the Quinault Reservation, and that the Quileute Tribe (one of the tribes whose hereditary members accepted Quinault allotments) had earlier elected to forego any treaty rights it may have claimed in the Quinault Reservation in order to retain its ancestral village at LaPush. The record establishes jurisdiction over the Quinault Reservation to be in the Quinault Tribe, an IRA tribe.

2. Indian Probate: Indian Reorganization Act of June 18, 1934: Construction of Section 4 - Indian Probate: Wills: Construction of

Sec. 4 of the Indian Reorganization Act of 1934 prior to amendment in 1980 did not permit devises of trust property found on reservations subject to the Act to persons who were neither

heirs of the decedent allottee nor members of the tribe having jurisdiction over the reservation where the trust land is located. Thus, since appellee was neither a member of the Quinault tribe nor an heir of decedent, he was barred from taking trust property on the Quinault Reservation under the decedent's will.

APPEARANCES: Frederick L. Noland, Esq., for appellants Esther Elvrum, Irene Soeneke, Phillip C. Hanson, Philip S. Talbot, Alice Manes, Pearl Cousens, Dorothy Murray, Ira Talbot, Jacqueline Jauhola, Dorothy Nelson, Edward Verney, Patrick Verney, Bertha Bousley, Audrey Beaston, Delmar Gagnon, Ruby McCovey, Gwendolyn Sanchez, Donna Grosz, Marlene Thweatt, Clarence Colby, Robin Halstead, Charles Talbot, Charles Williams, Estate of Patrick Wilkie, Jr., Estate of Edward (Edison) Talbot, Estate of Bruce Wilkie; Jon Marvin Jonsson, Esq., for appellee Leo

Williams; Carl V. Ullman, Esq., for Intervenor Quinault Indian Nation; Robert S. Thompson, Esq., on behalf of the Solicitor of the Department of the Interior.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On September 21, 1970, decedent Joseph Willessi died testate at Forks, Washington, at the age of 77 years. At his death decedent was a member of the Quileute Indian Tribe holding allotment No. 1432 of trust lands on the Quinault Reservation; was beneficial owner of a village lot on the Quileute Reservation at LaPush; and also held a partial interest in trust lands located on the Makah Reservation. Decedent's will, signed on January 12, 1968, devised his trust property on the Quinault and Makah Reser-

vations to appellee Leo Williams, also a member of the Quileute Tribe. Decedent's will devised the LaPush property to Nellie W. Richards, decedent's cousin, who is Leo Williams' mother. The value of the estate in 1970 when probate was commenced was estimated at $151,750. During the course of probate, however, it became apparent that the true value of the trust property, of which the Quinault allotment comprises the most valuable part, is in excess of $1,100,000.

Procedural and Factual Background

On February 10, 1972, decedent's 1968 will was approved, and distribution of the trust estate ordered in conformity to the terms of the will to the two named devisees, Nellie W. Richards and appellee, Leo

Williams, both members of the Quileute Tribe. As a result of this order, Mrs. Richards took the property on the Quileute Reservation, while appellee received the Quinault and Makah trust lands. An appeal was taken from the February 10 order by eight of decedent's heirs at law who appeared in the initial proceeding. On August 8, 1974, this Board ordered a rehearing of the matter. Estate of Joseph Willessi, 3 IBIA 24 (1974).

On January 6, 1977, following an evidentiary hearing on contest of the 1968 will, where evidence which exclusively concerned decedent's competence to execute a will was offered, another order issued, approving decedent's will and decreeing distribution as before to appellee and his mother. On April 5, 1978, however, the

agency superintendent charged with administration of the probate orders petitioned to reopen decedent's estate alleging discovery of a mistake of law. 1/ According to the petition to reopen, both the Quinault and Makah Reservations were organized under the Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-79 (1976) (hereafter the Indian Reorganization Act of 1934, or IRA). The petition alleges appellee is neither a member of the Quinault or Makah Tribes nor an heir of decedent (since appellee's mother, through whom he traces his relationship to decedent, survived decedent), and concludes appellee is therefore barred from receiv-

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1/ The Apr. 5 petition to reopen also notes, for the first recorded time, that the value of the estate exceeds $1,100,000.

ing an interest in trust lands on either reservation by section 4, IRA (25 U.S.C. § 464 (1976)). 2/

On July 19, 1978, appellants, 26 heirs at law of decedent, in response to a notice from the Indian probate Administrative Law Judge dated April 13, 1978, denominated "Notice to Show Cause" also petitioned to reopen alleging the same

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2/ The statute provides, in pertinent part, a restriction on devises limiting them so that: "[R]estricted Indian lands * * * [may]be * * * devised * * * to the Indian tribe in which the lands * * * are located * * * and, in all instances such lands * * * shall descend or be devised * * * to any member of such tribe * * * or any heirs of such member." (Section 4 of the IRA was amended by the Act of Sept. 26, 1980, P.L. 96-363, 94 Stat. 1207, which relaxed the restricting classification to permit devises to "lineal descendants" or "any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust," a change not material to this decision.)

mistake of law as had the superintendent. On November 6, 1978, an order issued reopening the estate and ordering distribution to the heirs, citing Estate of Dewey Cleveland, 5 IBIA 72, 83 I.D. 170 (1976), as authority for the action taken reversing the previous orders of distribution. On November 14, 1968, appellants petitioned to modify the November 6 order to correct a claimed mistaken classification of heirs. On November 17, 1968, appellee, Leo Williams, appealed to this Board from the order of November 6, 1978, seeking reversal of the November 6 order and reinstatement of the prior orders which had approved the will and ordered distribution of the Quinault property to appellee.

On April 3, 1979 (following an amendatory order entered February 8, 1979), the Administrative Law Judge notified the parties that based upon "documents" which had come to his attention, he proposed to seek return of the probate of decedent's estate from this Board where appellee's appeal from the November 6 order was pending, to reverse the order decreeing distribution to the heirs.

On November 16, 1979, the Administrative Law Judge again reversed himself. Finding the Quinault Tribe lacked exclusive jurisdiction over the Quinault Reservation, he held the Quinault Reservation is a "joint jurisdictional area" where tribal jurisdiction resides "in all tribes who have been allotted on the reservation and all 'fish-eating Indians'

of the Northwest." The order directs distribution of the Quinault property according to the terms of the 1968 will to appellee, commenting as follows that the IRA is not relevant to the determination so made:

> I do not find it necessary to reach the question of the applicability of the Indian Reorganization Act of 1934 (25 USC 464), assuming its adoption by and compliance with by the Quinault Tribe since there is no indication in the inventory of this estate allotments originally allotted to Quinaults are involved. However, in passing, I merely note as dicta that since there is joint jurisdiction over the total reservation by the various and sundry tribes included within the provision "fish-eating Indians of the Pacific Northwest", any adoption of the Indian Reorganization Act by the Quinaults would appear to only affect their interest as it appears on the reservation and could not affect in toto the total allotments.

(Order dated Nov. 16, 1979, p. 2).

Appellants, 26 heirs of decedent, now seek review of the order decreeing distribution of the Quinault property to appellee. 3/ On August 28, 1980, the Quinault Indian Nation was permitted to intervene to brief the finding below that tribal sovereignty over the reservation was not exclusively vested in the Quinault Tribe. At the invitation of the Board, the Solicitor of the Department filed a brief on behalf of the Department of the Interior addressing the jurisdictional issues raised by the November 16, 1979, order of

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3/ The Nov. 16, 1979, order correctly found appellee to be ineligible to inherit property on the Makah Reservation, since, presumably, he is ineligible as a non-Makah to inherit, not being an heir of decedent, on a reservation which is organized under IRA. The only issue on appeal concerns the finding below that Quinault property could pass to appellee.

distribution. 4/ Appellee has objected that the matter is not properly before the Board for decision for the reason Departmental regulations bar reopening under the circumstances of this case. The contention that the reopening was irregular is found to be without merit; the matter is properly before this Board for final decision. 5/

4/ See 43 CFR 4.3(c) (1980); 46 FR 7334, 7336 (Jan. 23, 1981).

5/ The regulation in effect at the time reopening was sought and ordered, 43 CFR 4.242, permits petition for reopening within 3 years from date of a final decision or after a longer period of time upon showing that "manifest injustice" will result as a consequence of claimed error. Reopening was sought well within that time. Appellee also argues that principles of estoppel and res judicata bar this appeal, and that due process considerations of constitutional magnitude would be involved in an order setting

[Footnote continued]

[Footnote continued from previous page]

aside the devise in this case. With respect to estoppel, appellee contends that since the agency drew decedent's will, it was improper to permit the superintendent to complain about the effect of agency action. This argument has been rejected in past Indian probates; the Government is not bound by acts of its agents which are contrary to law. Estate of Lucinda Shelton Joe, 5 IBIA 20 (1976). Similarly, res judicata is not a bar here, for the parties and the issues on reopening are not the same as they were at the outset of this proceeding. In the initial hearing and at the 1976 rehearing, the competence of decedent was challenged by eight of his heirs at law: on reopening, the eligibility of appellee to take as a devisee under the will is disputed by 26 heirs (the original eight are, it is true, included as parties). Appellee also urges that section 4 of the IRA (prior to amendment) was unconstitutional if construed so as to defeat his claim. Although such an argument cannot be effectively addressed by the Board (Estate of William Konoa Jackson, 6 IBIA 52 (1977)), it is noted that statutes more restrictive of individual claims than is (or was) section 4 of IRA have withstood attacks upon constitutional theories of infirmity similar to those here offered by appellee, Simmons v. Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965), aff'd, 384 U.S. 209 (1966).

Oral Argument Denied

Appellee has requested oral argument before the Board. Appellants, the Quinault Tribe, and the Solicitor's Office oppose the request for the stated reason the expense of an oral presentation is not justified by the circumstances of the case on appeal, which they contend is fully and adequately presented by written briefs filed by all the appearing parties. The record on appeal indicates the matter has been fully and ably presented by the parties' briefs and does not require further argument. The record sufficiently presents the matter so as to permit decision. Accordingly, oral argument is denied.

Preliminary Findings

Though much of the record on appeal is a transcript of evidence gathered at the 1976 rehearing concerning decedent's competence to make a will in 1968, his competence as a testator is no longer an issue. The relevant facts on appeal are confined to matters concerning the tribal affiliation of appellee and the status of the reservations where the trust property held by decedent is located. It is undisputed that decedent, a Quileute, was allotted land on the Quinault Reservation, and that he devised trust property on the Quinault Reservation to appellee, who is not a member of the Quinault Tribe. Also, since appellee's mother survived decedent, appellee is not, under the law of the State of Washington, an heir at law of

decedent since he could not inherit from decedent under the State scheme for intestate succession while his mother lived. The Quinault Tribe voted to organize pursuant to provisions of the IRA on April 13, 1935, as did the Makah and Quileute Tribes. 6/ The Quileute Tribe adopted a constitution which was approved by the Secretary on November 11, 1936, providing that Quileute tribal jurisdiction is limited to the tribal reservation. 7/

6/ Appellee suggests these political acts by the tribes may not have been sufficiently proved by appellants. However, the status of the various tribes is a matter of which the Department takes official notice. 44 FR 7235 (Feb. 6, 1979). See Pamphlet, Baas, Ten years of Tribal Government Under I.R.A. (U.S. Indian Service 1947).

7/ Article I, Constitution and Bylaws of the Quileute Tribe of the Quileute Reservation (1936), as amended.

Historical Background

The history of the Quinault Reservation is set out by a recent Board decision construing sections 5 and 19 of the IRA: 8/

> By the Treaty of Olympia, the Quinault and Quileute Tribes ceded to the United States almost all of the lands they claimed. A provision of that treaty allowed the United States to later remove these tribes from their original reservation or reservations and consolidate them with "other friendly tribes or bands." In 1873 President Grant signed an Executive order setting the boundaries of the Quinault, Quileute, Hoh, Quit, and "other tribes of fish-eating Indians on the pacific coast."
>
> Following passage of the General Allotment Act, allotments were made to individual Indians

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8/ Brown v. Commissioner of Indian Affairs, 8 IBIA 183, 193-94, 87 I.D. 507, 512-13 (1980).

on the Quinault Reservation. In 1911 Congress directed the Secretary of the Interior to make allotments on the Quinault Reservation to "all members of the Hoh, Quileute, Ozette, and other tribes of Indians in Washington who are affiliated with the Quinaielt [a.k.a. Quinault] and Quileute Tribes * * * and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes." Act of Mar. 4, 1911, 36 Stat. 1345.

Following the 1911 Allotment Act, several court decisions were rendered interpreting the law. In United States v. Payne, 264 U.S. 446 (1924), the Court disapproved of the refusal by the Bureau of Indian Affairs to make allotments of timberland, after the available grazing and agriculture land on the reservation had been allotted. In 1931 the Supreme Court held as too restrictive the Secretary's interpretation concerning which Indians were entitled to an allotment under the 1911 Act. Halbert v. United States, 283 U.S. 753 (1931). The Court there found that the Chehalis, Chinook, and Cowlitz Tribes were among those referred to by Congress in

> the Act as affiliated with the Quinault and Quileute Tribes. Further, the Court held that personal residence on the Quinault Reservation was not required to obtain an allotment.
>
> After the Halbert decision the Department resumed the allotment process on the Quinault Reservation. With passage of the Indian Reorganization Act in 1934 the allotment of Indian reservation land in severalty to any Indian was ended. [Citations and footnotes omitted.)

In 1922 the Quinault Tribe adopted bylaws which provided that membership in the tribe should be limited to Quinault or Queets persons of at least one-quarter blood. Hereditary members of other tribes, including the Quileute, could become "affiliated members" if they resided on the reservation. This limitation upon tribal membership was later liberalized to permit "affiliated" members

to enroll as members of the tribe. 9/

It is apparent that official and legislative references to the "affiliation" of the Quileute and Quinault Tribes describe the affiliation of those tribes contemplated by the 1855 treaty. The history of the two tribes demonstrates, however, that their "affiliation" failed to occur in fact. It appears the Quileute Tribe refused to remove to the territory designated by the 1873 Executive Order establishing the Quinault Reservation and insisted upon retaining the traditional

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9/ Article II of the Constitution of the Quinault Indian nation (1975) permits persons of Queets, Quileute, Hoh, Chinook, Chehalis, or Cowlitz descent to be admitted to tribal membership. Although the Quinault Tribe did not adopt a formal constitution immediately upon acceptance of the IRA in 1935, nothing in the Act requires such action. See 25 U.S.C. § 476 (1976) (sec. 16, IRA).

Quileute tribal village and fishing area at LaPush. The position of the Quileute Tribe is described in the court's opinion in United States v. Moore, 62 F. Supp. 660, 668-669 (W.D. Wash. 1945), aff'd, 157 F.2d 760 (9th Cir. 1946):

> An abortive effort was made to establish [the Quileute Tribe] on the Quinaielt Reservation, which was created by presidential proclamation by President U.S. Grant. They declined to accept this as a reservation, even though some of them did take allotments on the Quinaielt Reservation. Their reason for not accepting the government's offer to go upon the Quinaielt Reservation was that the Quinaielts and Quillehutes for hundreds of years had been enemies, and the Quinaielts did not welcome them. An effort was then made to remove them from their village at the mouth of the Quillehute River to the Makah Indian Reservation, some forty miles to the north, and this again they refused, for the reason that their interpretation of the treaty was that they were to be given a reservation where

they had always lived at the mouth of the Quillehute River.

* * * * * * * *

* * * We must presume that President Cleveland, in promulgating the order creating the [Quileute] reservation, did so with an intent to carry out the provisions of the [1855] treaty [of Olympia]. This is more conclusively established when we note that the proclamation itself was drafted by the Indian Service, who, for thirty-five years, had been endeavoring to secure for this tribe of Indians a reservation "sufficient for their wants," and who, as evidenced by the numerous documents in this record, repeatedly called to the attention of the Commissioner of Indian Affairs and the Secretary of the Interior that these Indians were "fish eating Indians" and their sole means of subsistence depended upon a continued use of the waters from which they caught their fish.

Discussion and Decision

[1] The Administrative Law Judge's November 16 order assumes as the legal basis for his decision that the allotment on the Quinault Reservation to individual Indians conferred jurisdiction over the reservation upon the tribes in which the allottees were members or to which they had hereditary affiliations. This thesis of allotment as a jurisdictional act, buttressed by an old probate opinion, Estate of mary Sailto, Probate 41969-39, 10/ becomes the legal foundation for his later approval of the devise of Quinault

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10/ Two other decisions are cited: Estate of Tommy Brown, Probate 8859-35 and Estate of Mary Wheeler, Probate 6679-35. Neither of these cases, however, has any applicability to this matter since they involve the probate of estates not affected by the IRA.

trust property to an individual who is neither an heir of the decedent allottee nor a member of the Quinault Tribe. While the approach taken permits avoidance of consideration of section 4 of the IRA, it is not permissible, under the circumstances of this case, to avoid analysis of the effect of section 4 upon the will in probate.

The General Allotment Act, the Act of February 8, 1887, 24 Stat. 388, was envisioned as a means to assimilate the Indian into the general American society. Contrary to the assumption in the order under review, the allotment to individuals was done in derogation of tribal sovereignty, and was intended to dismantle tribal government rather than to extend it. Hopkins v. United States, 414 F.2d

464, 467 (9th Cir. 1969). The antithesis to the Allotment Acts is the Indian Reorganization Act of 1934 which ends the allotment process and seeks to revitalize and strengthen tribal self-government. 11/ The allotment of the Quinault Reservation which began in 1887 and continued under the 1911 Allotment Act, was ended in 1935 when allotments to individuals were prohibited by section 1 of the IRA. The jurisdictional basis for the exercise of tribal sovereignty over the reservation is properly traced, thus, not to the allotment acts, but rather through the treaty rights conferred by the 1855 treaty and the executive orders establishing the

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11/ Fisher v. District Court, 424 U.S. 382, 387 (1976); and see Cohen, Handbook of Federal Indian Law (1941), pp. 84-87.

Quinault and Quileute Reservations to the action taken by the Quinault Tribe to organize under the IRA.

In Halbert v. United States, 283 U.S. 753 (1931), the Court determined that allotment on the Quinault Reservation could, under the 1855 treaty, properly be made to tribes affiliated with the Quinault and Quileute Tribes without regard to individual residence. It was not suggested by the court, however, that allotment might confer jurisdiction over the Quinault Reservation upon the tribes of allotted individuals. That argument was expressly rejected by the Court of Appeals in Moore v. United States, supra at 157 F.2d 764.

> Appellants contend that because in 1910, over 20 years after the reservation was made, certain members of the Quillayute

> Tribe received allotments of land in another reservation, the Quinaielt, we must assume that the President in 1889 did not intend to reserve the tide lands and river waters in the 500 acres occupied by the two hundred persons of the Quillayute Tribe. The Quinaielt reservation was made to include the Quillayute Indians, but it was created in 1873. The 1855 treaty with the Quillayutes provided that tribe "agree to remove to and to settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them." At this later date, 18 years after the time for removal, the Quillayutes declined to move away from their ancestral home and immemorially established maritime industries on the Quillayute River. The government acquiesced and they remained in LaPush. We are unable to see any relevance of the 1910 allotments in determining the intent of the president in the reservation of 1889. [Footnote omitted.]

The Administrative Law Judge compounded his error when he relied upon an obscure 1939 Departmental opinion, the

Estate of Mary Sailto, Probate 41969-39, which he quotes in his order of November 16 to find: "No single or particular tribe or band of Indians can be said to have exclusive jurisdiction over the Quinault Reservation. Such jurisdiction as does exist appears to be a concurrent one vested in the tribes or bands of Indians whose members have been allotted on said reservation." Both quoted conclusions stated are incorrect. Immediately after the creation of the Quinault Reservation, while the Quileute Tribe might have sought to relocate with the Quinaults, a joint jurisdiction over the reservation may have been possible. In fact it never occurred. The second suggestion that tribal organization is limited by hereditary affiliations is

simply wrong.

Under the circumstances of this case, the Sailto decision, relied upon by the Administrative Law Judge does not support his conclusion. First, it is clear that the Quileute Tribe has not asserted jurisdiction over the Quinault Reservation, but elected to keep the tribal land at LaPush instead of accepting an affiliated status with the Quinault Tribe. Sailto notes this fact. Second, it is also historically clear that the Quinault Tribe has, since adoption of the IRA, continuously exerted claim to exclusive jurisdiction over the Quinault Reservation. 12/ Sailto considers the

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12/ Congress recognized the Quinault Tribe to be the proper party plaintiff to

[Footnote continued]

historical record of the tribal organizations involved, finds the Quileute Tribe is limited to its own reservation at LaPush, but misconstrues Solicitor's Opinion, M-27796 (Nov. 7, 1934) to permit a finding that the Quileute devisee may take Quinault property, based in part upon a determination that the Quinault Tribe is not a single tribe having political powers

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[Footnote continued from previous page]

represent all Indian claims arising in the Quinault Reservation by the Act of July 24, 1947, 61 Stat. 416. See also Act of Aug. 25, 1959, 73 Stat. 427. The Secretary of the Interior, by communication to Congress dated May 22, 1947, described the status and composition of the tribe as "[c]ollectively the indians having an interest in that reservation, including those of the blood of other tribes consolidated with the Quinaielts pursuant to the treaty, Executive order, and act of Congress [who] may be regarded as one tribe," a position consistent with prior Departmental statements concerning the issue (see Op. Sol. M-27796 cited in n.13).

but a mere collection of hereditary groups. The opinion is internally inconsistent, fragmentary, and poorly reasoned. It fails to recognize that the Quinault Tribe is a unitary political body although it is composed of members who have hereditary connections with other tribes. Sailto represents an anomaly in Departmental decisionmaking in this area, and has not been followed. It has no value as precedent. 13/ Analysis of section 4 of the IRA is required in order to decide this appeal.

[2] Section 4 of the IRA, prior to

13/ Solicitor's Opinion, M-27796 (Nov. 7, 1934), I Op. Sol. on Indian Affairs 478 (1979), was apparently the basis for the "concurrent" jurisdiction language appearing in Sailto. The conclusion stated is, however, an erroneous application of the Solicitor's opinion.

its amendment in 1980, restricted the alienation of Indian trust lands to three classes of devisees: The tribe upon whose reservation the lands are located; members of the tribe; and legal heirs of the testator. The restriction does not apply to reservations which did not adopt the IRA, nor does it apply to lands outside Indian reservations. Trust lands unrestricted by the IRA may be devised to anyone named by the testator, subject only to Departmental approval. Under section 4 of the Act, a devisee of trust property who is not a member of the tribe on whose reservation the land is located may take by devise from an Indian will only if the devisee is a legal heir of the testator who would inherit according to the inheritance scheme of the

applicable state probate code. 14/ Since this restriction on the class of devisee is well established, the only possible avoidance of the limitation upon a non-member devisee is through a finding that the trust land is not located on an IRA reservation or, as was done below in this case, through a finding that the devisee's

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14/ Since Solicitor's Opinion, M-27776, 54 I.D. 584 (Aug. 17, 1934), the Department has consistently followed the stated principles in construing section 4 of the IRA. Estate of Cleveland Iron Shooter, 7 IBIA 212 (1979), on appeal as Ramirez v. Andrus, CA 79-L-79 (D.C. Neb.); Estate of Dewey Cleveland, 7 IBIA 72 83 I.D. 170 (1976); Estate of Rose LaRose, 2 IBIA 60, 80 I.D. 620 (1973); Estate of Emma Blowsnake Goodbear Mike, IA-916 (Oct. 26, 1960). Contrary to the assertions of appellee, the meaning of the word "heirs" as used in section 4 is not ambiguous. As the Aug. 1934 Solicitor's opinion observes (54 I.D. 586-587), "It requires no strained construction of language to interpret the phrase 'or any heirs of such member' * * *. * * * the phrase * * * should properly be construed to mean 'heirs of the testator.'"

tribe has jurisdiction over the reservation where the trust land is located. 15/ The record establishes that appellee, neither a member of the Quinault Tribe nor an heir of decedent, is ineligible under section 4 of the IRA, to take trust property devised to him which is located on the Quinault Reservation, since that reservation is under the jurisdiction of the Quinault Tribe which adopted IRA organization in 1935. The order appealed from must be reversed.

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals

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15/ Solicitor's Opinion, M-27796, n.12, supra, discusses several possible jurisdictional situations. The Quinault Tribe's situation is described at I Op. Sol. 479: "(c) A group of Indians residing on a single reservation, who may be recognized as a 'tribe' for purposes of the Wheeler-Howard Act regardless of former affiliations.

by the Secretary of the Interior, 43 CFR 4.1, the order dated November 16, 1979, approving the devise of trust property to appellee of Quinault trust lands is set aside. The Administrative Law Judge is directed to prepare an order of distribution of the Quinault trust property to decedent's heirs at law.

This decision is final for the Department.

Franklin D. Arness
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

P.O. Box 3785
Portland, Oregon 97208

IN THE MATTER OF THE ESTATE OF	)	
JOSEPH WILLESSI	)	MODIFICATION ORDER
DECEASED QUINAULT ALLOTTEE 117-1432 OF THE PUGET SOUND INDIAN AGENCY OF THE STATE OF WASHINGTON	)	

This Order is entered in keeping with the Order of the undersigned of May 15, 1979, which offered the various parties the opportunity to file memorandum briefs on the legal question raised concerning the final order of distribution as set forth in my letter to counsel of record of April 3, 1979, a copy of which was attached to the said Order of May 15, 1979. The time allowed for the filing of briefs has expired.

It appears my Order of Reopening and Modification of November 6, 1978, which reversed my Order of January 6, 1977, was in error since the Quinault Indian Reservation is not under the singular jurisdiction of the Quinault Indian Tribe but is in fact a joint

jurisdictional area in which such jurisdiction as has been granted by the Congress of the United States lies in all tribes who have been allotted on the reservation and all "fish-eating Indians" of the Northwest. Treaty with the Quinai-elt and Quil-leh-ute Indians, July 1, 1855, and January 25, 1856, 12 State. 971, Cappler, Vol. II, P. 719; Executive Order of November 4, 1873, Cappler Vol. I, P. 923; Halbert v. United States, 283 US 753 (1931), Solicitor's Opinion M 27796 (Nov. 7, 1934), Estate of Tommy (Thomas) Brown, Pro. 8859-35, Estate of Mary Wheeler, Pro. 86679-35, Estate of Mary Sailto, Pro. 41969-39, Solicitor's Opinion M, 27796 (Nov. 7, 1934).

The jurisdictional question of the Quinault Reservation was succinctly but not altogether completely stated by the Commissioner in the Estate of Sailto, supra, as follows:

> "No single or particular tribe or band of Indians can be said to have exclusive jurisdiction over the Quinault Reservation. Such jurisdiction as does exist appears to be a concurrent one vested in the tribes or bands of Indians whose members have been allotted on said reservation."

Inasmuch as I have not found any statutes, regulations or subsequent decisions contradictory to the above-cited precedents, nor have any been cited to me

in the filed briefs, and since tribal governmental authority and jurisdiction as granted by the Congress of the United States will not be diminished except by clear, expressed and unequivocal action of that Congress, I am without authority but to rule there is no one tribal jurisdiction within the confines of the exterior borders of the Quinault Reservation. Brian v. Itasco County, 426 US 373 (1976). If there is to be any enlargement or other change in the jurisdictional rights of any of the affected tribes on the Quinault Reservation, such can only be accomplished by congressional action and not by actions of this department.

It further appears, therefore, that an order should be entered directing distribution of estate assets situate on the Quinault Reservation to the devisee LEO WILLIAMS in accordance with the Third and Residual Clauses of the last Will and Testament of January 12, 1968. Additionally, the order should direct distribution of assets of the estate situate on the Makah Reservation to the heirs at law of the decedent in the shares indicated as found in the Order of February 8, 1979. In view of the above, I do not find it necessary to reach the question of the applicability of the Indian Reorganization Act of 1934 (25 USC 465), assuming its adoption by and compliance with by the Quinault Tribe since there is no indication in the inventory of this estate allotments originally allotted to Quinaults are involved. However, in passing, I merely note as dicta that since there is

joint jurisdiction over the total reservation by the various and sundry tribes included within the provision "fish-eating Indians of the Pacific Northwest", any adoption of the Indian Reorganization Act by the Quinaults would appear to only affect their interest as it appears on the reservation and could not affect in toto the total allotments. This seems a reasonable interpretation since to hold otherwise would in effect make all other allotments on the reservation subject to and subservient to the whims of the Quinault Tribal Council. I find no law in support of this last premise. Additionally, it is also conceivable the Quinault's adoption, assuming such be the case, of the Indian Reorganization Act may not affect landed interests at all on the reservation since it is probable Section 4 of the Act would, under the peculiar circumstances of this reservation, not be applicable in any event and only the organizational sections of the Act would have any force and effect. Such would appear so in view of the circumstances of the creation of the Quinault Reservation, but as indicated, I need not speak to these questions in reaching the decision herein. Suffice it to say devisee LEO WILLIAMS can and does inherit the Quinault interest of this estate, under present Federal law, to the extent as devised in the Last Will and Testament.

NOW, THEREFORE, the Order approving the Last Will and Testament and decree of distribution of January 6, 1977, as modified by the Order of Reopening and

Modification of November 6, 1978, and the modification of February 8, 1979, is further modified so as to direct distribution in accordance with the Third and Residual Clauses of the Last Will and Testament of the decedent of January 12, 1968, to LEO WILLIAMS (as described in the estate inventory) save and except the landed interests of the estate situate on the Makah Reservation, subject to the provisions of the Indian Reorganization Act of 1934 (25 USC 464) which are to be distributed to the heirs at law and in the proportions indicated as determined in the Order of February 8, 1979.

IT IS FURTHER ORDERED the Petition for Contingent Attorney's Fees of five per cent (5%) of additional assets recovered in the estate proceedings on behalf of the various heirs at law as their proportionate interests appear and costs in the sum of $676.15 requested by Ziontz, Pirtle, Morisset, Ernstoff and Chestnut, though appearing just and reasonable is denied since it appears from the inventory of the estate the assets under this Order received by said heirs are of such a nominal nature as to render the allowance of attorney's fees, as indicated, an unwarranted burden upon the United States.

Dated this 16th day of November, 1979, at Portland, Oregon.

ROBERT C. SNASHALL
Administrative Law Judge

Judgment

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEO WILLIAMS,	)	NO. 83-4229
	)	
Petitioner-Appellant,	)	USDC NO. CV
	)	81-700C
vs.	)	
	)	
WILLIAM P. CLARK,	)	
	)	
Respondents-Appellees.	)	

APPEAL from the United States District Court for the WESTERN District of WASHINGTON (SEATTLE).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the WESTERN District of WASHINGTON (SEATTLE) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED.

Filed and entered September 11, 1984

TREATY, EXECUTIVE ORDERS, STATUTES

A. TREATY: TREATY WITH QUINAIELT, ETC., 1855, 12 Stat 971 (1855 and 1856) reprinted in I C. Kappler, Indian Law and Treaties 719 (1904):

Articles of agreement and convention made and concluded by and between Isaac I. Stevens, governor and superintendent of Indian affairs of the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them.

ARTICLE 1. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of montains; thence southerly with said range of mountains to their intersection with the dividing ridge between the Chehalis and

Quiniatl Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning.

ARTICLE 2. There shall, however, be reserved for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

ARTICLE 6. The president may hereafter, when in his opinion, the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place

or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which

latter case the annuities, payable to the consolidated bands respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor.

B. EXECUTIVE ORDERS: EXECUTIVE ORDER ESTABLISHING THE QUINAULT RESERVATION, reported in I C. Kappler, Indian Laws and Treaties 923 (1904):

[In Puyallup Agency; occupied by Hoh, Quaitso, and Quinaielt tribes; area, 350 square miles; treaties July 1, 1855, and January 25, 1856.]

Executive Mansion, November 4, 1873

In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory (which tract includes the reserve selected by W.W. Miller, superintendent of Indian affairs for Washington Territory, and surveyed by A.C. Smith, under contract of September 16, 1861) be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the pacific coast, viz: Commencing on the pacific coast at the southwest corner of the present reservation, as established by Mr. Smith in his survey under contract with Superintendent Miller, dated September 16, 1861; thence due east, and with the line of said survey, 5 miles to the southeast corner of said reserve thus established; thence in a direct line to the most southerly end of Quinaielt Lake; thence northerly around the east shore of said lake to the northwest point thereof; thence in a direct line to a point a half mile north of the Queetshee River and 3 miles above its mouth; thence with the course of said river to a point on the pacific coast, at low-water mark, a half mile above the mouth of said river; thence southerly, at low-water mark, along the Pacific to the place of beginning.

U.S. Grant

* * * *

EXECUTIVE ORDER ESTABLISHING THE QUILEUTE RESERVATION, reported in I C. Kappler, Indian Laws and Treaties 923 (1904):

[In Neah Bay Agency; area, 1 1/2 square miles, occupied by Quileute tribe.]

Executive Mansion, February 19, 1889

It is hereby ordered that the following-described tracts of land situate in Washington Territory, viz: Lots 3, 4, 5, and 6, section 21; lots 10, 11, and 12, and the southwest quarter of the southwest quarter, section 22; fractional section 27, and lots 1, 2, and 3, section 28; all in township 28 north, of range 15 west, be, and the same are hereby, withdrawn from sale and settlement and set apart for the permanent use and occupation of the Quillehute Indians: Provided, That this withdrawal shall not affect any existing valid rights of any party.

Grover Cleveland

* * * *

C. STATUTES:

5 U.S.C. § 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 392; Oct. 21, 1976, P.L. 94-574, § 1, 90 Stat. 2721.)

* * * *

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or other-

wise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 393.)

* * * *

25 U.S.C. 464 (1970) (Section 4 of IRA in force at date of decedent's death in this case), Transfer of restricted Indian lands or shores in assets of Indian tribes or corporation; exchange of lands:

Sec. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such

lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: Provided further, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

* * * *

25 U.S.C. 464 as amended on Sept. 26, 1980, P.L. 96-363, § 1, 94 Stat. 1207:

Sec. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal

laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior may hold land in trust: Provided further, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

* * * *

25 U.S.C. § 476 (Section 16 of IRA). Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the

Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

* * * *

25 U.S.C. § 478 (Section 18 of IRA)
Acceptance of IRA

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

25 U.S.C. § 479 (Section 19 of IRA).
Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or

more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

* * * *

25 U.S.C. § 2206. Escheat of certain fractional interests

No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descedent [descend] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

(Jan. 12, 1983, P.L. 96-459, Title II, § 207, 96 Stat. 2519.)

The bracketed word "descend" is inserted in this section as the word probably intended by Congress.

* * * *

RELEVANT PROVISIONS OF THE CONSTITUTION OF THE QUILEUTE TRIBE OF THE QUILEUTE RESERVATION RATIFIED BY A VOTE OF THE MEMBERSHIP OF THE QUILEUTE TRIBE ON OCTOBER 10, 1936 AND APPROVED BY THE SECRETARY OF THE INTERIOR ON NOVEMBER 11, 1936:

PREAMBLE

WE, the Indians of the Quileute Tribe of the Quileute Reservation, Washington, pursuant to the Act of Congress of June 18, 1934 do hereby establish this Constitution of the Quileute Tribe in order to secure a more perfect tribal organization, promote the general welfare, encourage educational progress, conserve and develop our Lands and our resources, and secure to ourselves and to our posterity the power to exercise certain rights of home rule.

ARTICLE I - TERRITORY

The jurisdiction of the Quileute Tribe shall include all of the territory within the original confines of the Quileute

Reservation as set forth by Executive Order of February 19, 1889, and shall extend to such other lands as have been or hereafter may be added thereto under any Law of the United States, except as otherwise provided by Law.

RELEVANT PROVISIONS OF THE CONSTITUTION OF THE QUINAULT TRIBE OF THE QUINAULT INDIAN NATION RATIFIED BY A VOTE OF THE MEMBERSHIP OF THE QUINAULT TRIBE ON MARCH 22, 1975:

PREAMBLE

WE, the Indians of the Quinault Indian Nation, in order to establish a better tribal organization; to preserve our Land base, culture and identity; to safeguard our interest and general welfare; to secure the blessings of freedom and liberty for ourselves and for our posterity; and to amend our By-Laws of August 22, 1922, as amended, do hereby approve and adopt this Constitution.

ARTICLE I - SOVERIGNTY

SECTION 1 - SOVEREIGNTY. Notwithstanding the issuance of any patent, the jurisdiction and governmental power of the Quinault Nation shall extend to: (a) all lands, resources, and waters reserved to the Quinault Nation pursuant to the Treaty of Olympia, 12 Stat. 971, established by Executive Order dated November 4, 1873 (I C. Kapp. 923) and to all persons acting within the boundaries of those reserved lands or waters; (b) all usual and accustomed fishing grounds, open and unclaimed lands reserved for hunting and gatherings and other lands necessary for the appropriate use of fishing and hunting grounds; and all members exercising tribal hunting, gathering and fighting rights on or off the Quinault Reservation in Quinault's

usual and accustomed fishing grounds; or (c) all lands or waters held by the United States in trust or reserved by the Quinault Nation for the use and benefit of any member of the Quinault Tribe when such lands or waters are not within the boundary of an established Indian Reservation; (d) all members of the Quinault Nation while such members are within the boundaries of the United States of America or any of its reservations, states, territories, possessions, zones or districts; except where such jurisdiction is expressly limited by the laws of the United States; (f) off-shore marine waters for a distance concurrent with the jurisdiction with the United States.